

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIAN JAMES BROOKS and JENNIFER
HATCHER BROOKS,

No. 3:18-cv-00717-YY

ORDER

Plaintiffs,

v.

BC CUSTOM CONSTRUCTION, INC.;
HOF II VERTICAL, LLC; THE HOLT
GROUP, INC.; GREG KUBICEK; and
WILLIAM C. WINKENBACH,

Defendants.

HERNÁNDEZ, District Judge:

Magistrate Judge You issued a Findings and Recommendation [ECF 47] on May 21, 2019, in which she recommends that this Court grant in part and deny in part the Motion to Dismiss [ECF 26] filed by Defendants BC Custom Construction, Inc., and William C. Winkenbach (collectively the “Builder Defendants”); and grant in part and deny in part the Motion to Dismiss [ECF 28] filed by Defendants HOF II Vertical, LLC; The Holt Group, Inc.; and Greg Kubicek (collectively the “Lender Defendants”). In particular, Magistrate Judge You recommends the Court:

(1) Dismiss Plaintiffs’ Claim One in part without prejudice and with leave to amend on the bases that (a) Defendants are not “creditors” within the meaning of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601 *et seq.*, and (b) Plaintiffs cannot obtain actual damages under TILA

because they have not adequately pleaded detrimental reliance. Judge You, however, also recommends the Court decline to dismiss Claim One in part on the basis that Plaintiffs have adequately alleged that Builder and Lender are “mortgage originators” within the meaning of TILA;

(2) Dismiss Plaintiffs’ Claim Two, which Plaintiffs bring under the Oregon Mortgage Lender Law, Oregon Revised Statutes §§ 86A.095–86A.103, without prejudice and with leave to amend;

(3) Dismiss Plaintiffs’ Claim Three under the Oregon Mortgage Loan Origination law, Oregon Revised Statutes §§ 86A.200–86A.242, with prejudice;

(4) Dismiss Claim Four under the Oregon Unlawful Trade Practices Act, Oregon Revised Statutes §§ 646.605–646.652, without prejudice and with leave to amend;

(5) Decline to dismiss Claim Five, which Plaintiffs bring against the Builder Defendants for breach of fiduciary duty;

(6) Decline to dismiss Claim Six, which Plaintiffs bring against the Lender Defendants for aiding and assisting the breach of a fiduciary duty;

(7) Decline to dismiss Claim Seven as to the Lender Defendants. Although Plaintiffs bring Claim Seven against all Defendants under an unjust-enrichment theory, only the Lender Defendants moved to dismiss Plaintiffs’ unjust-enrichment claim; and

(8) Resolve Plaintiffs’ claims for declaratory and injunctive relief in the same manner as the corresponding underlying claims set out above.

The matter is now before the Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b). Each of the parties filed timely objections to the Magistrate

Judge's Findings and Recommendation. Lender Defs' Objs., [ECF 51, 56];¹ Plaintiffs' Objs. [ECF 53]; Builder Defs' Objs. [ECF 54].² When any party objects to any portion of the Magistrate Judge's Findings & Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

The Court has carefully considered the parties' objections and concludes there is not any basis to modify the Findings and Recommendation. The Court has also reviewed the pertinent portions of the record *de novo* and finds no error in the Magistrate Judge's Findings and Recommendation.

CONCLUSION

The Court, therefore, ADOPTS Magistrate Judge You's Findings and Recommendation [ECF 47] as its own Opinion and Order. Accordingly, the Court GRANTS in part and DENIES in part the Builder Defendants' Motion to Dismiss [ECF 26] and GRANTS in part and DENIES in part the Lender Defendants' Motion to Dismiss [ECF 28].

The Court, therefore, DISMISSES Plaintiffs' Claim One in part without prejudice and with leave to amend as set out above. The Court also DISMISSES Plaintiffs' Claims Two and Four without prejudice and with leave to amend. The Court DISMISSES Plaintiffs' Claim Three with prejudice. The Court, however, declines to dismiss Plaintiffs' Claims Five through Seven,

¹ On July 10, 2019, the Lender Defendants filed a Reply [ECF 60] in support of their Objections to the Magistrate Judge's Findings and Recommendation. On July 15, 2019, however, the Lender Defendants withdrew that Reply because reply memoranda are ordinarily not permitted to be filed in support of objections to a magistrate judge's findings and recommendation without leave of Court. Accordingly, the Court declines to consider the Lender Defendants' Reply.

² The Court notes the Builder Defendants object to the portion of the Findings and Recommendation in which Judge You declined to dismiss Plaintiffs' unjust-enrichment claim. The Builder Defendants, however, did not move to dismiss Claim Seven in their Motion [ECF 26]. In any event, the Court finds no error in the Magistrate Judge's analysis on Claim Seven.

and resolves Plaintiffs' claims for declaratory and injunctive relief in the same manner as the underlying substantive claims.

IT IS SO ORDERED.

DATED this 1 day of July, 2019.


MARCO A. HERNANDEZ
United States District Judge